124

(3)

No. 08-643

FILED
MAR 2 4 2 3
OFFICE OF THE CLERK
SUPREME COURT

IN THE

Supreme Court of the United States

HENRY A. CANALES-MATAMOROS,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

THOMAS E. MOSELEY
One Gateway Center
Suite 2600
Newark, New Jersey 07102
(973) 622-8176

Counsel for Petitioner

CP

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
PRELIMINARY STATEMENT	1
A. *A Significant Circuit Split Exists*	1
B. *The Government's Arguments On the Merits Are Immaterial*	5
CONCLUSION	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Agency Holding Corp. v. Malley Duff & Associates, Inc., 483 U.S. 143 (1987) 4

Arriaga v. Mukasey, 2009 U.S. App. LEXIS 2353 (9th Cir., Jan. 13, 2009) 2

Bahar v. Ashcroft, 264 F.3d 1309 (11th Cir. 2001) 2

Begay v. United States, 128 S. Ct. 1581 (U.S. 2008) 5

Chevron USA v. Natural Res. Def. Council, 467 U.S. 837 (1984) 7

Emile v. INS, 244 F.3d 183 (1st Cir. 2001) 4

Estrada-Espinoza v. Mukasey, 546 F.3d 1147 (9th Cir. Oct. 20, 2008) 1, 2, 3, 6, 7

Fong Haw Tan v. Phelan, 333 U.S. 6 (1948) 8

Gattem v. Gonzales, 412 F.3d 758 (7th Cir. 2005) 4

INS v. Aguirre—Aguirre, 526 U.S. 415 (1999) 7

Cited Authorities

	Page
Lamie v. United States Trustee, 540 U.S. 526 (2004)	4
Lara-Ruiz v. INS, 241 F.3d 934 (7th Cir. 2001)	3
Leocal v. Ashcroft, 543 U.S. 1 (2004)	7
Lopez v. Gonzales, 549 U.S. 47 (2006)	7
Matter of Rodriguez-Rodriguez, 22 I & N Dec. 991 (BIA 1999)	2, 4, 7
Mugalli v. Ashcroft, 258 F.3d 52 (2d Cir. 2001)	3
Negusie v Holder, 129 S. Ct. 1159 (Mar. 3, 2009)	7
United States v. Baza-Martinez, 464 F.3d 1010 (9th Cir. 2006)	3
United States v. Osborne, 551 F.3d 718 (7th Cir., Jan. 5, 2009)	1
United States v. Padilla-Reyes, 247 F.3d 1158 (11th Cir. 2001)	2, 6
United States v. Williams, 128 S. Ct. 1830 (2008)	5

Cited Authorities

Page

Statutes:

8 U.S.C. §1101(a)(43)(A) ..... *passim*

8 U.S.C. §1227(a)(2)(E) 6

8 U.S.C. §1326(b)(2) 4, 9

15 U.S.C. §15b 4

18 U.S.C. §1961 *et seq.* 4

18 U.S.C. §2243 1

18 U.S.C. §3509 4

18 U.S.C. §3509(a)(8) 7

Other Authorities:

Black's Law Dictionary at 10 (8th ed. 2004) 3

3 C. Gordon, S. Mailman, S. Yale-Loehr, *Immigration Law and Procedure* § 71.01[6][b] 8

PRELIMINARY STATEMENT

Petitioner Henry A. Canales-Matamoros ("Mr. Canales" or "Petitioner") submits this reply in support of his petition for certiorari. A clear conflict among the circuits exists and the government's arguments on the merits should not defeat certiorari.

A. *A Significant Circuit Split Exists*

The government ignores the obvious split among the Circuits presented here over the controlling rule for determining whether an offense falls within 8 U.S.C. §1101(a)(43)(A) (sexual abuse of a minor), a split that makes the Petitioner deportable in the Eleventh Circuit, where the government transferred him for removal proceedings, but not in the Ninth Circuit. In this connection, the unanimous en banc opinion in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1158 (9th Cir. Oct. 20, 2008) could hardly be clearer in expressly holding that, "[i]n sum, we conclude that when Congress added 'sexual abuse of a minor,' to the list of the aggravated felonies in the [Act] it meant 'sexual abuse of a minor' as defined in the federal criminal code." *See also Estrada*, 547 F.3d at 1152 ("Congress has enumerated the elements of the offense of 'sexual abuse of a minor" at 18 U.S.C. §2243."). Moreover, other circuits have had no difficulty in recognizing this explicit holding. *See, e.g., United States v. Osborne*, 551 F.3d 718, 721 (7th Cir., Jan. 5, 2009) (Easterbrook, J.) (describing *Estrada* as holding that " 'sexual abuse of a minor' in immigration law means a state offense that would be a crime under [18 U.S.C. §2243]."). Furthermore, subsequent decisions from the Ninth Circuit have not retreated from this broad holding

adopting the federal criminal definition of sexual abuse of a minor nor have subsequent decisions read *Estrada* as somehow limited based upon the age of the alleged victim, despite the government's erroneous suggestion to the contrary. Brief for the Respondent in Opposition ("Opp.") at 13-14. *See, e.g., Arriaga v. Mukasey*, 2009 U.S. App. LEXIS 2353 (9th Cir., Jan. 13, 2009) (federal criminal definition of sexual abuse of a minor applied to reject aggravated felony charge in case involving thirteen year old).

By contrast, the Eleventh Circuit has expressly rejected adoption of the federal criminal definition of sexual abuse of a minor under 8 U.S.C. §1101(a)(43)(A). Accordingly, this case presents a clear conflict between the Eleventh Circuit and Ninth Circuit on at least two levels. First, *Bahar v. Ashcroft*, 264 F.3d 1309 (11th Cir. 2001), which the decision below held as controlling, defers to *Matter of Rodriguez-Rodriguez*, 22 I & N Dec. 991 (BIA 1999), while *Estrada* accords no deference to this Board precedent. Second, as the government recognizes, Opp. at 4, *Bahar* rests upon *United States v. Padilla-Reyes*, 247 F.3d 1158 (11th Cir. 2001), which expressly refuses to apply the federal criminal law definition of sexual abuse of a minor under 8 U.S.C. §1101(a)(43)(A). *Padilla*, 247 F.3d at 1164 (rejecting argument that federal criminal law definition should control; "Congress did not intend to rely on other statutory provisions for its definition of [sexual abuse of a minor]. . . ."). Yet *Estrada* holds that the federal criminal definition of sexual abuse of a minor does apply under 8 U.S.C. §1101(a)(43)(A).

Thus, in the Ninth Circuit the uniform federal criminal law definition of sexual abuse of a minor controls whether an alien has been convicted of such an offense under 8 U.S.C. §1101(a)(43)(A), but in the Eleventh Circuit, as in the Second and Seventh Circuits, this uniform federal criminal definition does not apply. *See Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001); *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001). Furthermore, that the Ninth and Eleventh Circuits reach such radically divergent results based upon the plain language of the Act makes the conflict no less real, though *Estrada* would seem to have the better of the plain language argument.[1] *See, e.g., Black's Law Dictionary* at 10 (8th ed. 2004) (sexual abuse defined as "An illegal sexual act esp. one performed against a minor by an adult.").

In short, a clearer conflict over the controlling rule of decision could hardly be imagined. Indeed, to say that the views of the Ninth Circuit and the Eleventh Circuit are merely "in tension," Opp. at 3, 15[2], would be akin to

---

1. The government can hardly reduce this conflict by reference to dicta in the decision by the panel in *United States v. Baza-Martinez*, 464 F.3d 1010 (9th Cir. 2006), Opp. at 16, for *Baza-Martinez* antedated the unanimous en banc decision in *Estrada*, took care to note that whether touching was required for sexual abuse of a minor presented an open question, and actually held that the same North Carolina statute at issue here did not categorically constitute sexual abuse of a minor because the statute did not require any abusive effect on the victim. 464 F.3d at 1015.

2. Ironically, the government's main brief before this Court in *Nijhawan v. Holder*, Dkt. No. 08-495 all but acknowledges this conflict in pointing out that *Estrada* declined to give deference to the BIA's construction of sexual abuse of a minor. Brief for the Respondent at 49 n.18.

saying that this Court's decision in *Agency Holding Corp. v. Malley Duff & Associates, Inc.*, 483 U.S. 143 (1987) adopting the Clayton Act limitations period (15 U.S.C. §15b) for civil RICO litigation under 18 U.S.C. §1961 *et seq.* is merely "in tension" with other authority relying upon the most appropriate state statute of limitations. Furthermore, the obvious conflict presented here will apply not only in the immigration context but in the criminal sentencing arena as well given the enhancement provided by 8 U.S.C. §1326(b)(2), which turns on whether the alien has been convicted of an aggravated felony. In this connection, moreover, the government errs in seeking to characterize the conflict presented as one with respect to United States Sentencing Guidelines, Opp. at 16-17, which is simply not the case. Instead, the conflict plainly involves 8 U.S.C. §1326(b)(2) itself.

Furthermore, there would also appear to be a conflict with this Court's precedent, especially that requiring resort to the plain language of the statute. *See, e.g., Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). The plain language of the Act bases deportation upon an alien's having been convicted of an aggravated felony, yet *Rodriguez-Rodriguez* rests upon a social welfare statute that does not define a crime for which one could ever be convicted. *See Emile v. INS*, 244 F.3d 183, 186 n.2 (1st Cir. 2001) ("debatable how relevant [18 U.S.C. §3509(a)(8)] may be. . . . ,"citing dissent in *Rodriguez-Rodriguez.*); *Gattem v. Gonzales*, 412 F.3d 758, 768 (7th Cir. 2005) (Posner, J., dissenting) (BIA was "[c]asting far afield," in selecting 18 U.S.C. §3509 because ". . . it is not a statute that criminalizes sexual abuse. Rather, it provides procedural protections

for child victims and child witnesses. . . ."). Similarly, there would also appear to be conflict with the controlling rule of statutory construction, *noscitur a sociis*, which requires items enumerated in a series to be construed in a similar fashion. *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008); *Begay v. United States*, 128 S. Ct. 1581 (U.S. 2008). Indeed, just as the familiar series of "lions, tigers, and bears," finds meaning by reference to the characteristics of feral animals and not the ASPCA, so too does the series of "murder, rape and sexual abuse of a minor" in 8 U.S.C. §1101(a)(43)(A) find meaning by reference to criminal offenses and not social welfare provisions.

In short, there is both a serious split among the circuits and a divergence from this Court's precedent strongly supporting a grant of certiorari. Likewise, the government's attempt to paper over this conflict by recasting the question presented as limited to the North Carolina statute, Opp. at I, misses the point that the conflict here is over the controlling rule for deciding whether any offense falls within 8 U.S.C. §1101(a)(43)(A).

B. *The Government's Arguments On the Merits Are Immaterial*

Blind to the obvious Circuit split, the government attempts to defeat certiorari by arguing the merits. Yet these flawed contentions provide no cogent basis for declining review in the face of markedly different rules for both removal proceedings and federal criminal sentencing. First, the government urges, Opp. at 8, that resort to a federal criminal definition is appropriate only where Congress has specifically included such a

provision Yet *Estrada*, 546 F.3d at 1156 persuasively answers this contention, holding,

> The fallacy of this argument is apparent upon comprehensive examination of the lists of aggravated felonies. Section 1101(a)(43) includes 21 subsections, some of which cross-reference other statutory provisions, and some of which do not. Significantly, there is a clear distinguishing characteristic between the aggravated felonies that are linked to other statutory provisions and those that are not. Those that refer to a broad category of offenses, using a potentially ambiguous phrase, reference other statutory provisions for clarification. On the other hand, those that refer to a specific crime which is already clearly defined in criminal law have no need for cross-reference. (citations omitted). 'Sexual abuse of a minor' falls into the latter category, because it refers to a specific crime.

Compare Padilla, 247 F.3d at 1164, which reaches a diametrically opposite conclusion.

Second, the government attempts to raise alleged practical concerns with respect to the age definition of the victim in the federal criminal offense of sexual abuse of a minor, even though this case does not present such an instance of a victim under age 12. Opp. at 9. In this connection, moreover, the government fails to note that Congress has provided a much broader ground of deportation in 8 U.S.C. §1227(a)(2)(E) for conviction of "child abuse," ideally suited to filling any perceived gap here. Likewise, reversing the decision below hardly

requires rejection of the persuasive dissent by Board Member Guendelsberger in *Rodriguez-Rodriguez*, 22 I & N Dec. at 1000 that 8 U.S.C. §1101(a)(43)(A) "should be applied in a manner consistent with the federal criminal law definition of 'sexual abuse of a minor' that is set forth at 18 U.S.C. §§2241-2246," which, in the appropriate case, would pick up those provisions dealing with persons under 12 years old. By contrast reliance upon the shifting multi-factor test unleashed by the majority in *Rodriguez-Rodriguez* risks degeneration into subjective post-hoc judgments that fail to provide fair notice of what will result in deportation and enhanced criminal punishment.

With respect to claimed deference under *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837 (1984), Opp. at 6, *Estrada* persuasively holds that no deference should be accorded the majority in *Rodriguez—Rodriguez*, for that decision did not construe the Act and produce a uniform definition of sexual abuse of a minor but instead adopted 18 U.S.C. §3509(a)(8) as an advisory guideline, one that would be subject to multi-factor analysis on a case by case basis. Furthermore, unlike the limitations upon asylum and withholding of removal in *INS v. Aguirre—Aguirre*, 526 U.S. 415 (1999) and now *Negusie v Holder*, 129 S. Ct. 1159 (Mar. 3, 2009) the provision at issue here is both a deportation ground and part of a federal criminal statute. Thus in both *Lopez v. Gonzales*, 549 U.S. 47 (2006) and *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court did not even refer to *Chevron* in deciding aggravated felony issues, even though in *Lopez*, for example, the Board had ruled to the contrary in a precedent decision, *Matter of Yanez*. *See also Leocal*, 543 U.S. at 12 n.8 ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies"). With the Ninth Circuit having held that

the federal criminal definition of sexual abuse of a minor applies and the Eleventh Circuit having rejected this view, there is plainly a "grievous ambiguity," present, even accepting the government's test for applying the rule of lenity at face value, Opp. at 11.

Furthermore, in urging that the Attorney General, and not this Court, should be the ultimate arbiter of ambiguity even for a provision that is both part of a federal criminal statute and a deportation ground is to jettison the rule of lenity altogether and act as though *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9 (1948) had never been decided. *Compare* 3 C. Gordon, S. Mailman, S. Yale-Loehr, *Immigration Law and Procedure* § 71.01 [6] [b] (deportation statutes must be "strictly construed" and "must be limited to the narrowest compass reasonably extracted from their language").

CONCLUSION

The Eleventh Circuit and Ninth Circuit have adopted conflicting rules of decision for determining whether an offense constitutes sexual abuse of a minor under 8 U.S.C. §1101(a)(43)(A). Moreover, this clear conflict extends beyond deportation and also affects a federal criminal statute, 8 U.S.C. §1326(b)(2). Accordingly certiorari should be granted to resolve this significant conflict.

Respectfully submitted,

THOMAS E. MOSELEY
One Gateway Center
Suite 2600
Newark, New Jersey 07102
(973) 622-8176

Counsel for Petitioner